

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

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|---|---|--------------------------|
| PAINTERS DISTRICT COUNCIL NO. 2 et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | Case No. 4:07CV00704 JCH |
| v. |) | |
| |) | |
| MCCOY DRYWALL, INC., |) | |
| |) | |
| Defendant. |) | |

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR A CREDITOR'S BILL IN EQUITY AND TO PIERCE THE CORPORATE VEIL**

A. Procedural History

On March 13, 2008, this Court entered a Consent Judgment [Doc. 11] against defendant McCoy Drywall, Inc., in the amount of Fifty Thousand Four Hundred Eighty Dollars, forty-one cents (\$50,480.41), for contributions owed to Plaintiff Funds for all weeks up to week ending January 16, 2008, plus interest going forward from the date of the Consent Judgment of 8% APR on the unpaid balance until paid in full. Plaintiffs have attempted to collect against defendant's assets, but have not made a full recovery. McCoy Drywall, Inc., has paid \$8,748.40 of the Consent Judgement.

B. Background Facts

McCoy Drywall, Inc., is a Missouri corporation. Based upon records maintained by the Missouri Secretary of State, McCoy Drywall, Inc., was formed on or about February 14, 1997. *See*, Exhibit A; *see also*, Affidavit of James P. Faul, para. 3. The most recent Annual Report filed with the Secretary of State lists McCoy Drywall, Inc.'s officers as: Harold L. McCoy, President; Darlene McCoy, Vice President; Diane Fehrman, Secretary; and John Fehrman, Treasurer. As of April 30, 2009, McCoy Drywall, Inc., was still a functioning corporation in Missouri. *See*, Exhibit A; *see*

also, Faul Affidavit, para. 4.

On or about March 12, 2009, Darlene McCoy, of 5264 Seckman Spring Drive, Imperial, Missouri 63052, organized Greenway Drywall, LLC. *See*, Exhibit B; *see also*, Faul Affidavit, para. 5. Like McCoy Drywall, Inc., Greenway Drywall, LLC, is a drywall contractor. *Id.* Darlene McCoy is an officer or member in each company. (*See*, Exhibits A & B; *see also*, Faul Affidavit, para. 4 & 5.) Upon information and belief, Darlene McCoy is married to Harold L. McCoy, President of McCoy Drywall, Inc. Also, upon information and belief, Darlene McCoy is Diane Fehrman's mother and John Fehrman's mother-in-law. Both Diane and John Fehrman are officers in McCoy Drywall, Inc.

C. Piercing the Corporate Veil

To pierce the corporate veil under Missouri law and recover from the assets of a corporation's alter ego, a creditor must show that the alter ego has "control" of the entity's finances, policy, and business practices with respect to the transaction at issue. Mobius Management Sys., Inc. v. West Physician Search, L.L.C., 175 S.W.3d 186, 188. There must be a "breach of duty - that this control was used by the corporation to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or to commit a dishonest and unjust act in contravention of the plaintiff's legal rights" that caused the injury to the plaintiff. *Id.* at 188-9. The corporate veil can be pierced when a corporation's assets are stripped to avoid creditors. *Id.* at 189. (Citations omitted).

In this case, the key occurrence is the formation of Greenway Drywall, LLC, by McCoy Drywall, Inc.'s Vice President, the President's wife. This event took place only one day before the entry of a Consent Judgment and before McCoy Drywall Inc., satisfied its debt to plaintiffs. By her own admission in a record submitted to the State of Missouri, Darlene McCoy organized Greenway

Drywall, LLC, serves as its registered agent at the same address as McCoy Drywall, Inc., and is a member managing Greenway, Drywall LLC, as a drywall contractor, the same business engaged in by McCoy Drywall, Inc. [Ex. A & B].

D. The Creditor's Bill in Equity

In the absence of a controlling federal statute, the District Court “has the same authority to aid judgment creditors in supplementary proceedings as that which is provided to state courts under local law.” H.H. Robertson Co. v. V.S. DiCarlo General Contractors, Inc., 994 F.2d 476, 477 (8th Cir. 1993), *cert denied*, 510 U.S. 1019 (1993). A creditor’s bill under Missouri common law “enables a judgment creditor to ‘trace the value of the goods and services rendered to an empty-shell corporation to the parties behind such a corporation who have received and benefitted from the property or services.’” Id. (quoting Shockley v. Harry Sanders Realty Co., 771 S.W.2d 922, 925 (Mo. Ct. App. 1989)). The Eighth Circuit has recognized the availability of a creditor’s bill. H.H. Robertson Co., 994 F.2d at 477; *see also*, Greater St. Louis Constr. Laborers Welfare Fund v. Sunrise Construction, No. 4:05-cv-0481 (SNL) (Judgment entered January 8, 2009); *and* Local 513, International Union of Operating Engineers, AFL-CIO, et al., v. Sunrise Construction, No. 4:04-cv-267 (CEJ) (Judgment entered July 7, 2009).

A creditor’s bill allows a judgment creditor to “pierce the corporate veil” of its debtor, and satisfy the judgment from the assets of the real parties in interest. Fleming Companies, Inc. v. Rich, 978 F.Supp. 1281, 1294 (E.D. Mo. 1997). “A creditor’s bill is considered the equitable equivalent of garnishment on execution and is comparable to proceedings supplementary to and in aid of execution.” Shockley, 771 S.W.2d at 925.

The alter ego entities against whom the creditor’s bill is brought need not have been parties

to, or even had formal notice of, the earlier proceedings. H.H. Robertson Co., 994 F.2d 476; Shockley, 771 S.W.2d at 925. There must be a judgment; the issuance of an execution on the defendant's assets and no satisfaction thereof. Id. The creditors must have no adequate remedy at law. Id.

In Fleming, fraud under the Uniform Fraudulent Transfers Act was present. See, e.g., Fleming Companies, 978 F.Supp. at 1293-94. In H.H. Robertson Co., the Eastern District of Missouri issued a creditor's bill where the original debtor exercised complete control over the alter ego and was unable to pay off its creditors due to fraud. 789 F.Supp. 998, 1000 (E.D. Mo. 1992), *aff'd*, 994 F.2d 476 (8th Cir. 1993).

Here, a creditor's bill is merited. Plaintiffs obtained a Consent Judgment. The Consent Judgment remains unsatisfied. Finally, garnishment was attempted. See, H.H. Robertson Co., 994 F.2d at 478; [*see also*, Faul Affidavit, para. 6, 7]. Moreover, Darlene McCoy has admitted she exercises control over both McCoy Drywall, Inc., and Greenway Drywall, LLC, and that they participate in the same business, at the same address, for the same purpose. [Ex. A & B]. Under these circumstances, the only explanation for the formation of Greenway Drywall, LLC, is to avoid paying the debts owed by McCoy Drywall, Inc. [Faul Affidavit, para 8, 9].

E. Conclusion

The corporate veil of McCoy Drywall, Inc., should be pierced because McCoy Drywall, Inc., and Greenway Drywall, LLC, are controlled by Darlene McCoy and the formation of Greenway Drywall, LLC, has prevented plaintiffs from collecting their debt against McCoy Drywall, Inc., which Darlene McCoy's husband and McCoy Drywall, Inc.'s President, Harold L. McCoy, assented to in a Consent Judgment before this Court on March 13, 2008. Furthermore, plaintiffs are entitled

to a creditor's bill in order to satisfy the judgment against McCoy Drywall, Inc., from the assets of Greenway Drywall, LLC, Darlene McCoy, Harold L. McCoy, Diane Fehrman, and John Fehrman.

Respectfully submitted,

BARTLEY GOFFSTEIN, L.L.C.

/s/ James P. Faul

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2009, the foregoing was mailed by United States Postal Service to the following non-participants in the Electronic Case Filing:

Harold L. McCoy, President
McCoy Drywall, Inc.
5264 Seckman Spring Road
Imperial, MO 63052

Darlene L. McCoy, Vice President
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Darlene L. McCoy, Member
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